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Individually and On Behalf of All Others
Similarly Situated

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

DIANE MAROLDA, Individually and on
behalf of All Others Similarly Situated,

Plaintiff,

vs.

SYMANTEC CORPORATION,

Defendant.

Case No. 08-cv-05701 EMC
The Hon. Edward M. Chen

[PROPOSED] ORDER
(1) GRANTING FINAL APPROVAL
OF CLASS ACTION SETTLEMENT;
(2) ADDRESSING OBJECTIONS;
(3) APPROVING SERVICE
PAYMENTS TO CLASS
REPRESENTATIVES; AND
(4) AWARDING ATTORNEYS' FEES
AND COSTS

Judge: Hon. Edward M. Chen
Date: April 4, 2013
Time: 1:30 p.m.
Crtrm.: 5, 17th Floor

Trial Date: None Set

1 On April 4, 2013, the Court conducted a hearing with respect to the following
2 motions: (1) motion for final approval of class action settlement; and (2) motion of class
3 counsel for an award of attorneys' fees and costs. The Court has considered the documents
4 filed in connection with these motions as well as the oral argument presented at the
5 hearing. The Court finds and concludes as follows:

6
7 **I. FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

8 This action concerns certain of Defendant Symantec Corporation's computer
9 antivirus and other products (Norton AntiVirus, Norton Internet Security, Norton 360,
10 Norton Personal Firewall and Norton SystemWorks) (the "Products") and the automatic
11 renewal and upgrade programs offered in connection those products. If enrolled,
12 Defendant's automatic renewal program is designed to automatically renew consumers'
13 subscriptions to the Products when those subscriptions are set to expire. In addition to this
14 automatic renewal program, Plaintiff contends that Defendant implemented a program
15 whereby existing subscribers to the Products were offered an opportunity to upgrade their
16 then-existing subscriptions to one of the Products that included features different from or
17 additional to those in the Product to which they had previously subscribed. Plaintiff
18 contends that with respect to customers who chose to purchase an upgraded subscription
19 pursuant to the upgrade program, the automatic renewal feature of their existing
20 subscriptions was not automatically terminated. Rather, Plaintiff alleges that, unless a
21 customer took additional action to cancel the automatic renewal of his or her existing
22 product when s/he was notified of the upcoming renewal (or otherwise) that customer was
23 charged both the automatic renewal fee and the subscription price for the upgraded
24 product.

25 Plaintiff alleges that Defendant's upgrade offers failed to disclose and concealed the
26 fact that customers needed to take additional action to prevent the automatic renewal of
27 their or her existing subscriptions even after upgrading those subscriptions pursuant to an
28 upgrade offer. Plaintiff also alleges that Defendant's statements in the upgrade offers

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1 implicitly obligated Defendant terminate the customers' existing automatically renewing
2 subscription when a customer purchased an upgrade. Thus, according to Plaintiff, it was
3 improper for Defendant to charge customers to automatically renew their previous
4 subscriptions after those customers paid to purchase upgrades to those subscriptions.

5 Defendant has asserted that the nature and terms of its automatic renewal program
6 were completely disclosed to its customers in numerous transactional communications.
7 For example, Defendant claims that it disclosed the terms of its automatic renewal program
8 on the "Shopping Cart" page displayed to Plaintiff at the time of her original purchase and
9 enrollment in the automatic renewal program. Defendant claims that the terms were also
10 disclosed in the "Order Summary," which explained that Plaintiff was enrolled in the
11 automatic renewal program and advised her that she would be charged for the renewal and
12 that she could cancel at any time. Additionally, Defendant claims that Plaintiff received a
13 Pre-Billing Notification that contained similar disclosures, including a disclosure that
14 Plaintiff would be charged for the renewal unless she cancelled automatic renewal, and
15 then explained how she could cancel the renewal. According to Defendant, its disclosure
16 regime provides valid defenses to each of Plaintiff's substantive claims.

17 Defendant also asserts that an express contract was formed through the various
18 transactional documents communicated to Plaintiff during the course of her purchase
19 transactions, which defeats the "implied contract" claim Plaintiff alleges and all other
20 claims that are derivative of that claim.

21 Plaintiff Diane Marolda filed her complaint in this Court on December 19, 2008. In
22 that initial complaint, Plaintiff asserted claims for violations of California Business and
23 Professions Code § 17200 et seq. ("UCL") and Civil Code § 1750 et seq. (Consumers
24 Legal Remedies Act or "CLRA"). Defendant moved to dismiss the Complaint pursuant to
25 Federal Rule of Civil Procedure 12(b)(6).

26 Plaintiff filed a First Amended Complaint on April 20, 2009 to assert additional
27 claims for violations of Cal. Bus. & Prof. Code § 17500 et seq., breach of express and/or
28

1 implied contract, breach of covenant of good faith and fair dealing, money had and
2 received, unjust enrichment and declaratory relief.

3 Defendant moved to dismiss the First Amended Complaint pursuant to Federal Rule
4 of Civil Procedure 12(b)(6). After briefing and oral argument, the Court dismissed certain
5 of Plaintiff's claims, but sustained Plaintiff's claim under the "unfair" prong of the UCL
6 based upon Plaintiff's assertions that Defendant's conduct systematically breached its
7 implied contracts with customers. That order also sustained Plaintiff's breach of implied
8 contract, breach of covenant of good faith and fair dealing, money had and received, unjust
9 enrichment and declaratory relief claims.

10 On September 25, 2009, Plaintiff filed a Second Amended Complaint, which
11 asserted claims for unlawful, unfair and fraudulent conduct pursuant to Cal. Bus. & Prof.
12 Code § 17200 et seq., breach of implied contract, money had and received, unjust
13 enrichment and declaratory relief. Defendant again moved to dismiss pursuant to Federal
14 Rule of Civil Procedure 12(b)(6). In an order dated March 12, 2010, the Court sustained
15 Plaintiff's claim under the unfairness prong of the UCL, as well as Plaintiff's breach of
16 implied contract, money had and received, unjust enrichment and declaratory relief claims.

17 Defendant answered the Second Amended Complaint on March 26, 2010. In its
18 answer, Defendant denied Plaintiff's material allegations and asserted affirmative defenses
19 to Plaintiff's claims. The parties thereafter began exploring a possible settlement of the
20 matter, and reached a settlement in principle with the execution of a Memorandum of
21 Understanding on November 2, 2011.

22 Under the terms of the Settlement, a settlement class is to be certified consisting of
23 all Persons throughout the United States from October 1, 2005 through May 23, 2012 who
24 entered into an Eligible Transaction by 1) purchasing a subscription to an Eligible Product
25 and enrolling in Symantec's automatic renewal service for that product subscription and,
26 2) purchasing (or renewing), either during the term of that subscription or within 60 days
27 after an automatic renewal of that Eligible Product was charged to them by Symantec or its
28 agent(s), a second Eligible Product which was installed on the same computer, and were

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1 charged for both the automatic renewal of the initial software product subscription and the
 2 second Eligible Product subscription, and did not receive a refund for the automatic
 3 renewal charge(s) for the initial Eligible Product purchased. Excluded from the Settlement
 4 Class are: the Defendant, its predecessors, successors, and its current and former directors,
 5 officers, employees, agents, attorneys, representatives, affiliates, associates, consultants,
 6 advisers, parents and subsidiaries; and Persons who have purchased the product for resale,
 7 and any Person who has validly elected to exclude themselves from the Settlement Class.

8 The Settlement provides injunctive and equitable relief as well as monetary (or, at
 9 Class members' option, subscription extensions).

10 The injunctive and equitable relief under the Settlement requires Defendant to add
 11 an additional disclosure on its website (www.Norton.com) concerning its automatic-
 12 renewal feature. Specifically, Defendant must make the following conspicuous disclosure
 13 on the "Upgrades and Renewals" page of its web site, which is a page subscribers visit to
 14 upgrade an existing Eligible Product to a higher level product, whether in response to an
 15 alleged email solicitation or not:

16 **IMPORTANT:** Purchases of Norton subscription products
 17 from the Norton online store include enrollment in the Norton
 18 Automatic Renewal Service, unless you choose to cancel the
 19 service. If you are replacing an existing Norton product
 20 subscription, please make sure the existing subscription is NOT
 21 enrolled in the Norton Automatic Renewal Service. If you
 22 remain enrolled, your existing Norton product subscription will
 23 automatically renew prior to expiration. We will send you an
 24 email notification shortly before you are billed for the
 25 automatic renewal.

26 You can confirm your Norton Automatic Renewal Service
 27 status by logging in to your Norton Account at
 28 www.myNortonAccount.com and clicking the Automatic
 Renewal link at the top of the page. To turn off Automatic
 Renewal, uncheck the box next to the corresponding Norton
 product subscription and click the "update" button. If you do
 not find the Automatic Renewal link at the top of the page in
 your Norton Account (to the immediate right of the "Profile"
 link), then your existing product subscription is not enrolled in
 the Norton Automatic Renewal Service.

That disclosure must be maintained on Defendant's website (www.norton.com) for
 so long as it is not inconsistent with Defendant's planned business practices. To the extent

1 that Defendant intends to modify its business practices so that the practices, if
 2 implemented, would be inconsistent with this disclosure, counsel for the Parties are to
 3 meet and confer in an attempt to modify the disclosure to be consistent with Defendant's
 4 modified practices.

5 The Settlement also requires Defendant to implement a new business practice with
 6 respect to upgrades and automatic renewals. Specifically, in the event Defendant in the
 7 future solicits customers by email or other personal communication to upgrade an existing
 8 subscription to one of Defendant's products, when any customer purchases an upgrade
 9 pursuant to the solicitation, Defendant will cancel any automatic renewal program
 10 applicable to the original subscription and instead enroll the customer in the automatic
 11 renewal program for the upgraded subscription purchased pursuant to the solicitation.¹

12 The Settlement also requires Defendant to provide the following consideration to
 13 Settlement Class Members who submit valid claims:

14 1. Current Subscribers to a Symantec software product who do not submit valid
 15 proofs of purchase shall have the option to elect to receive either: one (1) two-month
 16 extension to their existing software license or one (1) ten-dollar (\$10.00) cash refund,
 17 regardless of the number of Eligible Transactions they may have made.

18 2. Current Subscribers to a Symantec software product who submit valid proofs
 19 of purchase for the Eligible Transaction(s) for which they are claiming settlement benefits
 20 shall have the option to elect, for each Eligible Transaction supported by valid proof of
 21 purchase information, either: one (1) two-month extension to their existing software
 22 license or a ten-dollar (\$10.00) cash refund.

23 3. If any Settlement Class Member electing to receive the subscription
 24 extension does not have a current subscription to the Symantec Product designated for the

25 ¹ Circumstances in which an inadvertent technical malfunction impairs this promotion,
 26 for example, if customers' automatic renewal service enrollments are not cancelled because
 27 of an inadvertent technical malfunction, shall not constitute a breach of this section.
 28 However, any automatic renewal customer affected by such malfunction shall be entitled
 to a refund of an automatic renewal charge for sixty (60) days upon request to Symantec.

1 extension(s), the Settlement class member shall receive a ten-dollar (\$10.00) cash refund
 2 for each Eligible Transaction for which they are entitled to relief under the Settlement
 3 Agreement.

4 The Settlement requires Defendant to provide the following compensation to former
 5 subscribers of any of the Eligible Products who submit valid claims:

6 1. Former Subscribers to a Symantec software product who do not submit valid
 7 proofs of purchase shall receive one (1) ten-dollar (\$10.00) cash refund regardless of the
 8 number of Eligible Transactions they may have made.

9 2. Former Subscribers to a Symantec software product who submit valid proofs
 10 of purchase for the Eligible Transaction(s) for which they are claiming settlement benefits
 11 shall receive a ten-dollar (\$10.00) cash refund for each Eligible Transaction supported by
 12 valid proof of purchase information.

13 In exchange for this compensation and injunctive relief, the Settlement Class
 14 releases the "Released Parties" from the "Released Claims," as those terms are defined in
 15 the Settlement Agreement, including a waiver of Civil Code § 1542.

16 This Court entered an Order granting the parties' Joint Motion for Preliminary
 17 Approval of Settlement on September 17, 2012.

18 Having considered the parties' motion for final approval of the settlement and all
 19 objections to the proposed settlement, the Court finds the settlement to be "fundamentally
 20 fair, adequate and reasonable" as is required under Federal Rule of Civil Procedure 23(e)
 21 and applicable Ninth Circuit authority. *See Mego Financial Corp. Sec. Litig.*, 213 F.3d
 22 454, 458 (9th Cir. 2000); *Officers for Justice v. Civil Service Commission*, 688 F.2d 615,
 23 625 (9th Cir. 1982).

24 "Assessing a settlement proposal requires a district court to balance a number of
 25 factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely
 26 duration of further litigation; the risk of maintaining a class action status throughout the
 27 trial; the amount offered in settlement; the extent of discovery completed and the stage of
 28 the proceedings; the experience and views of counsel; ... and the reaction of the class

1 members to the proposed settlement.” *Mego Financial*, 213 F.3d at 458. The district court
 2 also must satisfy itself that the settlement is not the product of collusion among the
 3 negotiating parties. *Id.*

4 Although Plaintiffs’ pleadings survived a number of motions to dismiss, given the
 5 evolution of case law regarding claims such as those at issue here, there is no guarantee
 6 that Plaintiffs would have prevailed on summary judgment or at trial. This case is
 7 complex, trial likely would have been protracted. Defendants have offered a substantial
 8 amount of money in settlement, and the injunctive and equitable relief provided for in the
 9 Settlement conveys significant benefits to the Class, as described above.

10 Plaintiff’s counsel, who are experienced attorneys, believe that the settlement is
 11 extremely favorable to the class. Approximately 3.9 million notices were delivered by
 12 email to class members, but only a very small percentage objected or opted out, as is
 13 discussed more fully below. The settlement was reached after lengthy, arms-length
 14 negotiations. The Court also concludes that notice of settlement to the class was adequate
 15 and satisfied all requirements of Federal Rule of Civil Procedure 23(e) and due process.
 16 Class members received direct notice by email, and additional notice was given by
 17 publication in numerous widely circulated publications as well as in numerous targeted
 18 publications. These were the best practicable means of informing class members of their
 19 rights and of the settlement’s terms. *See Silber v. Mabon*, 18 F.3d 1449, 1453-54 (9th Cir.
 20 1994) (affirming district court’s conclusion that notice by direct mail and publication was
 21 best practicable notice).

22 The Court concludes that final certification of the settlement class is appropriate.
 23 The four prerequisites of Rule 23(a) are met: the proposed settlement class includes
 24 millions of consumers (numerosity); all class members obtained similar anti-virus products
 25 (commonality); the named class representatives entered purchased an anti-virus product
 26 from Defendant and her claims are reasonably coextensive with those of the class as a
 27 whole (typicality); and class counsel are experienced and qualified to conduct the
 28 litigation, and there is no evidence of collusion (adequacy). The class is adequately defined

1 and clearly ascertainable – class members are individuals who were charged to
 2 automatically renew an existing subscription to one of the designated products after
 3 accepting a solicitation to upgrade that subscription (as more specifically described above)
 4 between October 1, 2005 through May 23, 2012. Finally, common questions of law or fact
 5 predominate, as all class members would have to demonstrate that the solicitation to
 6 upgrade was either false and misleading or that accepting the solicitation modified class
 7 members' earlier subscription agreements.

8 Finally, the Court concludes that Plaintiffs' attorneys are experienced and able, and
 9 fairly and adequately have represented and will continue to represent the interests of the
 10 class. *See* Fed. R. Civ. P. 23(g). Accordingly, Plaintiffs' attorneys will be appointed as
 11 class counsel for purposes of certification of the settlement class.

12 13 **II. SERVICE PAYMENTS TO CLASS REPRESENTATIVES**

14 Courts often award service payments to class representatives in compensation for
 15 shouldering significant burdens during the litigation: retaining counsel, producing
 16 documents, responding to written discovery, and conferring with counsel. *See, e.g., Mego*
 17 *Financial*, 213 F.3d at 463 (9th Cir. 2000) (approving incentive awards of \$5,000 to each
 18 of two class representatives in a settlement of \$1.725 million). The Court concludes that
 19 the proposed \$10,000 incentive payment to plaintiff Marolda is appropriate.

20 21 **III. ATTORNEYS' FEES AND COSTS**

22 “Under Ninth Circuit law, the district court has discretion in common fund cases to
 23 choose either the percentage-of-the-fund or the lodestar method.” *Vizcaino v. Microsoft*
 24 *Corp.*, 290 F.3d 1043, 1047 (2002). The benchmark award is twenty-five percent of the
 25 recovery obtained, “with 20-30% as the usual range.” *Id.* Although the twenty-five percent
 26 benchmark rate is a starting point for analysis, it may be inappropriate in some cases. *Id.* at
 27 1048. “Selection of the benchmark or any other rate must be supported by findings that
 28 take into account all of the circumstances of the case.” *Id.* Relevant circumstances include

1 the results achieved for the class, the risk to class counsel, benefits to the class other than
2 the cash settlement fund, market rates for contingency fee retainers, and the burdens
3 assumed by class counsel during the representation. *Id.* at 1048-50. The lodestar method
4 may be used as a cross-check of the percentage method. *Id.* at 1050.

5 Class counsel request an award of \$1.7 million. Defendant has agreed to pay
6 attorneys' fees and expenses of up to \$1.7 million separate and apart from administrative
7 costs. If the Court were to consider only the cash components of the settlement (i.e.,
8 payments available to Class members who received notice of the Settlement), counsel
9 request 4.3% or less of the available money recovery. However, the injunctive and
10 equitable relief component of the settlement confers a significant additional benefit on the
11 Class in that it avoids as much as \$196,000,000 in future alleged damages. Considering
12 that additional benefit, Class counsel seek a fee that is substantially less than 1% of the
13 benefit conferred under the Settlement.

14 A lodestar cross-check supports an award of \$1.7 million. Counsel have
15 documented hourly fees in excess of \$800,000. Thus an award of \$1.7 million would
16 require application of a multiplier approximately 2X, which is well within the acceptable
17 range. *See, e.g., Vizcaino*, 290 F.3d at 1051 (approving multiplier of 3.65).

18 The Court recognizes that class counsel assumed substantial risks and burdens in
19 representing Plaintiff in this action. The case has been vigorously contested: several
20 motions have been briefed and heard. Class counsel have committed to render continuing
21 services in connection with the settlement in the event changes in Defendant's business
22 practices necessitate changes to the disclosures posted on Defendant's web site. In the
23 Court's opinion, class counsel comported themselves in a capable and professional manner
24 throughout the case, and they obtained an excellent result for the class. Accordingly, the
25 Court has no hesitation in awarding attorneys' fees and costs in the amount of \$1.7 million.

1 **IV. ORDER**

2 (1) The motion for final approval of the class action settlement is GRANTED;

3 (2) The objections to the settlement are OVERRULED;

4 (3) The proposed service payments to class representatives are APPROVED; and

5 (4) The motion for attorneys' fees is GRANTED.

6
7 Dated: _____, 2013

8 _____
The Honorable Edward M. Chen
United States District Court Judge